



UNITED STATES
ATOMIC ENERGY COMMISSION
WASHINGTON, D.C. 20545

August 18, 1971

Honorable William H. Rehnquist
Chairman, Security Review Committee
Office of Legal Counsel, Room 5131
U. S. Department of Justice
Washington, D. C. 20530

Dear Mr. Rehnquist:

I felt it may be useful to the various Committee members to have this resume of the reasons that inclined us to circulate a preliminary draft of the enclosed material at our last meeting.

There were, of course, the original urgings to be imaginative and innovative; and our Committee's own study of the various problems, including the Ellsberg matter, that have pointed us in the direction of new legislation, such as discussed in your memorandum of August 5, 1971.

New legislative proposals in this area will be more likely to gain support if we can satisfy the Congress that it is not simply being asked to endorse (1) the status quo, or (2) substantially enlarged discretionary powers for the Executive Branch in this area. We should anticipate the need for some easily identified and readily understood quid pro quo.

We doubt that even the significantly-improved declassification regime which we intend to institute would be considered sufficient from that standpoint. Accordingly, we conceived the elimination or recasting of the Confidential level of classification would make the new sanctions more palatable and would add color and visibility to the revised Executive Order.

I have enclosed for your convenience an edited version of the earlier draft. We recognize that any proposal along these lines is likely to involve some disadvantages, perhaps outweighing the advantages. But, novel approaches may flush up other new ideas. For example, the one you suggested whereby we would, in effect, focus our efforts

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on further singling out Top Secret material from the regime for Secret and Confidential material. There may well be still other approaches and various refinements which might serve our needs.

These needs include, in our view, new legislation along the lines suggested in your memorandum of August 5, 1971. It may also require, now that we have a consensus for making "foreign relations" a twin basis with "national defense" in the Order, some new legislative support for that aspect if we wish to be able to invoke criminal or civil sanctions for improper disclosure of information classified strictly on foreign relations grounds.

We have not staffed out the idea within AEC, pending the Committee's reaction.

Sincerely,

SIGNED HOWARD C. BROWN, JR.

Howard C. Brown, Jr.
Assistant General Manager

Enclosures:

1. Actions to Highlight Objective
of Preventing Excessive Classification
2. Draft Executive Order _____

8/17/71

ACTIONS TO HIGHLIGHT OBJECTIVE OF
PREVENTING EXCESSIVE CLASSIFICATION

As things stand now under E. O. 10501, any information the publication of which "could be prejudicial" to the National Defense (Confidential) appears to be given, at the very outset of the Order, the same basic "off-limits" treatment that is given to information which if published would result in "exceptionally grave" (Top Secret) or "serious" (Secret) damage to the Nation.

The redraft under consideration would also give the appearance of expanding that approach to include on its own footing, matter concerning foreign relations field. Historically, the Executive Order has been related to National Defense considerations so that it would track the language of the espionage provisions of the Criminal Code. In other words a classifier's decision to place information under the Executive Order was supposed to reflect, at least impliedly, a decision that the unauthorized release of any level or category of information (including Confidential) would result in sufficient harm to the Nation to warrant bringing the espionage laws into play.

The immediate impression the new Order would give, therefore, was that its main purpose was to control more, rather than less, information.

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To counter that impression, perhaps an approach that would evidence dramatically and concretely the President's desires in this respect would be one that resulted in the elimination of the Confidential category, at least from the field of sensitive information subject to the espionage laws. Since so much of our domestic security regime and our international arrangements in the security field are geared to the three category approach, such a change would have to be handled with careful planning.

In practice, the Confidential category almost inevitably serves as the catch-all provision which, to an ultra-cautious classifier, could cover almost any sort of information. Resulting hazards can be mitigated through special emphasis on procedures for declassification, such as are called for in the proposed redraft. But to get at the root of the problem, and restore respect for and confidence in the basic classification system, steps need to be taken to head off classification action which, for purposes of our criminal laws tends to equate, in the public mind, the "could be prejudicial" type data with the "serious" and "exceptionally grave" damage-type data.

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Our regime of security controls is already grounded on the premise that there is a much greater difference between the Confidential and Secret levels than there is between the Secret and Top Secret levels. There is, for example, a substantial difference in the resources devoted to clearance procedures for access to Confidential, on the one hand, and Secret and Top Secret on the other hand. Also, document control procedures escalate in intensity markedly at the Secret level. Indeed, in terms of the kind of comparatively minimal security controls applicable at the Confidential level, it becomes difficult to distinguish such information from that which is given confidentiality status within the Government under a number of statutes, such as the Internal Revenue Code. There are statutory sanctions for violations of such confidentiality but they are of a significantly lower order than what is provided for in the espionage laws. But these lesser sanctions seem to achieve their objective.

This is not to say that the Confidential category need be eliminated from use for all purposes. It could be retained for purposes of identifying information, in addition to that

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subject to the espionage laws, which the Executive Branch considers should be exempt from public disclosure, and is properly exempt under the Freedom of Information Act.

Unauthorized disclosure of such information by government and contractor personnel could still be subject to administrative sanctions for domestic disclosures and to the penal sanctions of the various export control laws for unlicensed disclosure of any technical data in this category to foreign interests.

Such an approach should also help to establish a more receptive atmosphere for new supplemental legislation, such as that discussed in Mr. Rehnquist's memorandum of August 5, for unauthorized disclosure (or for expansion of the espionage laws to cover foreign relations, as well as national defense cases). That is, there should be better prospects for wide Congressional support if such legislation would have limited applicability.

The resulting atmosphere ought, furthermore, to dispose Congress to support the needed concept of Executive Branch finality of classification in such cases. (We would probably have to anticipate the possibility of limited judicial review in the event of a showing that a particular classification action was arbitrary or capricious.)

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The basics of this kind of approach, and their practical consequences, are illustrated in summary form in the enclosed chart.

There are, of course, various refinements that might be developed. One, illustrated in the enclosed draft Executive Order would retain the Confidential category as it is now but would relate it to information which needed protection to prevent "serious" harm to the U. S. In addition, the draft attempts to develop the kind of emphasis and appeal that seems to be warranted for a new Executive Order at this time.

Executive Order _____

Control [Safeguarding] of Classified Information

In furtherance of the ideals upon which this Nation was founded, citizens should be as fully and currently informed as possible about the activities of their government, including those activities covering the national defense and conduct of foreign relations. To that end, only such information concerning those activities as it is essential to safeguard, as provided hereinafter, in order to prevent serious [grave] harm to the national defense or the conduct of foreign relations through its use against the United States by potential enemies, shall be subject to the special constraints of this Order regarding public release.

Now, therefore, . . .

Section 1. Classified information, for purposes of this Order, shall consist only of the official information specified in Section 2 as is determined by senior government officials to warrant the protection of [the Espionage laws] and the other safeguards specified herein so as to control strictly the dissemination of such information to prevent serious [grave] harm to the United States in its national defense efforts or its conduct of foreign relations. Such classified information shall, however, be subject to the continuing review and declassification process under

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mandatory hereby to assure its availability to the public at the earliest practical time.

Section 2. Categories of Classified Information. For purposes of determining the stringency of controls, in light of the severity of potential harm to the United States by unauthorized release, the following categories of classification will be used:

(a) Top Secret: [as is].

(b) Secret: [as is except change "serious" to "grave" so as to contrast with "exceptionally grave" in Top Secret. Might also be well to add "clearly" before "result" here as well as in Top Secret].

[(c) Confidential. If this is retained here, it could be tightened up along these lines: "The use . . . only for . . . information . . . which would normally be expected to cause serious harm to the national defense of the U. S. or its conduct of foreign relations." Alternatively, if it is decided to use this category primarily for purposes of the Freedom of Information Act exemption, it should be moved to a separate part of the Order and provision could be made for somewhat different treatment of this category,

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such as automatic availability after some relatively

Level of Classification	Automatic Downgrading Controls				Prescribed Additions	
	Clearance	Access	Initial Class.	Declass.	Prescribed	Add
TOP SECRET (DI & RD)	No change	Tighten practices on need-to-know in varying degrees up to PAM type procedures	Tighten application of criteria	Advance time & Improve Management	1. Espionage laws (DI & RD: felonies, misdemeanors & injunctions) 2. Atomic Energy (RD: felonies, misdemeanors & injunctions)	1. ref. to foreign relations in espionage laws 2. provisions for misdemeanors & injunctions re any unauthorized disclosure of national defense or for. rel. info
SECRET (DI & RD)	No change	Tighten practices on need-to-know in varying degrees (up to PAM type procedures, if PAM envisages less than TS)	Tighten application of criteria	Advance time & Improve Management	1. Espionage laws (DI & RD: felonies, misdemeanors & injunctions) 2. Atomic Energy (RD: felonies, misdemeanors & injunctions)	1. ref to foreign relations in espionage laws 2. provisions for misdemeanors & injunctions re any unauthorized disclosure of national defense or for. rel. info
CONFIDENTIAL	No change	No change (Assume there would be no PAM in this category in any event)	No change	Automatic: 12-18 mos. (or less if so marked)	Change to rely on: <div data-bbox="1036 1675 1477 1816" style="border: 1px solid black; height: 67px; width: 272px;"></div>	

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